

OLDER CASES \ 1985

Petition of the SANYO MANUFACTURING CORPORATION; For Waiver of Part 15 of the Commission's Rules to allow the manufacture and marketing of a Specific Signal Display Device

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58 RR 2d 719 (February 26, 1985)

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FCC 85-82

Released: February 26, 1985;

Adopted: February 22, 1985

By the Commission: Commissioner Rivera dissenting and issuing a statement in which Commissioner Quello joins.

MEMORANDUM OPINION AND ORDER

1. The Commission has before it petitions for reconsideration of its decision set forth in the *Memorandum Opinion and Order* ("*Opinion*"), FCC 84-261 (adopted June 15, 1984 and released July 20, 1984). By means of that *Opinion*, we dismissed the subject petition for waiver failed by the Sanyo Manufacturing Corporation ("Sanyo"). Sanyo sought a waiver of 47 C.F.R. Sec. 15.65 *et seq.*, our all-channel television rules, to permit the manufacture and marketing of what it termed a "Specific Signal Display Device" or "SSDD." 1 We dismissed Sanyo's petition on the ground that the SSDD did not constitute a television receiver within the scope of either our all-channel rules or the All-Channel Receiver Act of 1962, P.L. 87-529, approved July 10, 1962, 76 Stat. 150, and incorporated into the Communications Act of 1934, as amended, at 47 U.S.C. Sec. 303(s). Accordingly, we held that no waiver was necessary. Our decision held that there was no legal impediment to the marketing of the Sanyo device.

2. Timely petitions for reconsideration have been filed by: (i) the National Association of Broadcasters ("NAB"); (ii) the Association of Maximum Service Telecasters, Inc. ("AMST"); (iii) the Council for UHF Broadcasting ("CUB"); and (iv) RCA Corporation ("RCA"). In addition, comments on the petitions have been tendered by the National Black Media Coalition ("NBMC"). 2 For the reasons discussed below, we affirm the result set forth in the *Opinion*.

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Summaries of the Pleadings

3. The petitioners allege substantive and procedural defects in our disposition of Sanyo's petition. They claim that the SSDD is a television receiver within the scope of 47 U.S.C. Secs. 303(s) and 330, and of 47 C.F.R. Sec. 15.65 *et seq.* Therefore, it is argued, because the SSDD offers reception capability for only two VHF and no UHF broadcast television channels, it is not lawful. Our previous finding that the SSDD is essentially a video monitor and not a television receiver is termed arbitrary and capricious. It is also claimed that the SSDD would frustrate the policies set forth by Congress in the All-Channel Receiver Act ("the Act") and by the Commission's own all-channel rules. NAB claims that our disposition of Sanyo's petition for waiver violated the rulemaking provisions of 5 U.S.C. Sec. 553, the Administrative Procedure Act ("APA"), and of Part 1 of our own rules (47 C.F.R. Secs. 1.399 *et seq.*). NAB also claims that the Regulatory Flexibility Act ("RFA"), P.L. 96-354, 94 Stat. 1164 (1980), requires initial and final regulatory flexibility analyses before commercialization of the SSDD can be permitted. No such analyses were performed in this case.

4. AMST alleges that the SSDD gravely threatens the financial health of UHF broadcasters and the viability of the new low-power television service. AMST states that many UHF full-service and all low-power stations, which do not enjoy must-carry status 3, would be foreclosed from reaching those cable subscribers who purchase an SSDD. It further contends that the *Opinion* fails to state adequately what type of "limited-channel television broadcast receiver" would or would not constitute a full-fledged receiver subject to the Act and our rules. CUB states that the technological changes which have prompted Sanyo to seek to market its product are irrelevant to the Act's and rules' applicability. CUB asserts that, at the least, we should hold the SSDD to be within the scope of the Act and rules, and that, if we feel such is warranted, we grant a waiver of our all-channel rules that elucidates our rationale for such a waiver to be in the public interest. RCA sees a dichotomy between our treating the SSDD as not a receiver for the purposes of the Act and our all-channel rules, but making it subject to the other (e.g., equipment authorization) rules applicable to television receivers. RCA also fears for consumers who buy an SSDD without realizing its inherent limitations. RCA asserts that a full rule-making proceeding is required, and that if after such the SSDD is authorized, consumer-information labelling akin to that required for cordless telephones be required. 4

5. NBMC asserts that the SSDD will undermine the Emergency Broadcasting System. In emergency or disaster situations with destruction or damage to cable systems, cable subscribers lacking broadcast television receivers will be unable to receive EBS broadcasts. The majority of SSDD/cable viewers, if they connect their SSDDs to external antennas, would be able to pick up either no or only one source of over-the-air EBS telecasts — a channel-3 or -4 VHF station. NBMC further claims that the SSDD will undermine our policy of fostering diversification of information sources. NBMC also claims that the SSDD would be anticompetitive: (1) in that it would impose "exit costs" on cable subscribers who at some point terminate cable service and return to direct, over-the-air reception; and (2) that, "[i]t is inherently anticompetitive for a cable operator to bundle its service with a receiver useful only for cable (or for viewing, in most of the country, only one over-the-air channel)." Finally, NBMC alleges that the children of the

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"information poor" would suffer from effects brought about by the SSDD. The "informationpoor," NBMC posits, lack substantial educational or economic resources and make greater use of over-the-air television broadcasts than others. NBMC envisions them buying SSDDs, temporarily or not at all subscribing to cable service, and using their SSDDs as babysitters for their children. These children would view programming from one, or at most two, VHF sources via external antennas. Such children, NBMC asserts, need more viewing alternatives.

Disposition of the Pleadings

6. Before addressing the arguments advanced in the pleadings, it must be borne in mind exactly what the SSDD is. At first glance, it looks in many respects somewhat akin to a traditional broadcast-television receiver. The crucial difference is that its r.f. tuner has only two-channel VHF capability. Also, it lacks an antenna. It bears this resemblance for a very practical reason. The manufacturers of video disc and cassette players, electronic games, home computers, etc., design their equipment to work with television receivers. Most of these devices create a modulated channel-3 or -4 VHF television signal so that the sounds and images they produce can be displayed on a (normally) vacant channel on the owner's television receiver. Otherwise, if such devices generated "baseband" video signals, those who desire to use them would have to purchase a specialized "video monitor" capable of responding to that type of signal. The added expense would hinder consumer acceptance of such program sources. Similarly, modern cable systems, which offer more channels of video programming than are available by direct, over-the-air, broadcast television, create artificial frequency relationships between the program signals within them. A convertor or program-selector box, supplied to subscribers, shifts the frequency of the desired program to VHF channel 3 or 4, whichever is unoccupied in that area. A subscriber leaves his television receiver tuned to that channel and makes all programming selections via the convertor. He needs no more than reception capability for that one channel.

7. The central question raised is whether a display device such as proposed by Sanyo falls within the scope of our all-channel rules and the All-Channel Receiver Act. This matter was addressed in the *Opinion* and no new arguments have been presented. We again note that such a device and the signal sources which use it are the products of technologies which did not exist when the statute and our own rules were enacted. CUB, citing *NAB v. FCC et al.*, 740 F.2d 1190 (D.C. Cir., 1984), claims that whether the technologies were in existence in 1962 is irrelevant. Rather, it asserts, the question should be whether the technology, "falls within the ambit of Congressional concern motivating the legislation." But that concern was to remedy a situation where the UHF television allocations were progressively being rendered less useful because fewer and fewer television sets could receive anything but the VHF channels. Here, we are not dealing with a technology that poses any real threat directed particularly to use of the UHF spectrum, but rather one that provides consumers with a less expensive way to take advantage of the general display capabilities of the cathode-ray tube. Clearly, one who purchases an SSDD with the sole intention of using it as a dedicated display device with a video disc or cassette player, computer, etc. in no way affronts Congress' intent with respect to broadcast television. Functionally, such conduct is exactly the same as using such a program output, as some of those appliances do. Similarly, a

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monitor connected to a cable convertor providing a baseband output performs the same function as an SSDD driven by the modulated, channel-3 or -4 output of the cable convertors now in widespread use. The petitioners admit that a video baseband monitor is not a receiver for the purposes of the Act. We see no rational basis to distinguish, for all-channel purposes, between such monitors and the SSDD. The two perform the same function; the only difference between them is that the SSDD is designed to work with more of the video program sources currently available to the consumer.

8. The argument that attaching a Sanyo-type device to a cable system renders subscribers unable to view channels not carried by the system is irrelevant to the All-Channel issue. CATV carriage is not governed by the All-Channel Act or our all-channel rules. Rather, the Commission has set up the must-carry rules. Those rules specify what must and what need not be carried on cable systems, and they do so on a frequency-neutral basis. To the extent that a cable system does not carry a local station — UHF or VHF, it makes no difference whether the subscriber uses a broadcast-television receiver, an SSDD, or a monitor.

9. NBMC has voiced concern over the inability of SSDD users to obtain Emergency Broadcasting System (EBS) information. The argument is that cable systems are vulnerable to natural and man-made disasters, that service could be lost when it is most needed, and that an SSDD is useless when unhooked from the system. This contention was not raised before. The Emergency Broadcast System is a voluntary network which utilizes not only broadcast-television facilities and participating cable systems to provide EBS alerts to an area, but also AM and FM broadcast radio stations. (In the next several months, five major cable-program suppliers will be added to the national-level EBS, and the Commission is continuing to encourage local cable systems to participate voluntarily in state and local-level EBS activities.) The public can obtain EBS information from any participating facility. All areas have at least one AM or FM radio "key" EBS station. Key EBS stations usually have emergency generators and two-way communications with local government officials so that they can provide information under adverse conditions. In contrast, the majority of broadcast-television stations lack back-up, emergency power sources.

10. NBMC's arguments with respect to EBS are flawed in several respects. Necessarily implicit in its position is that cable systems are significantly more vulnerable than over-the-air sources of television programming. Such a sweeping assumption is unwarranted. In our experience, the vulnerability of cable systems is of a comparable magnitude to that of broadcast-television transmitters, especially given their common and mutual dependence on utility power, and the growing practice of placing cable lines underground. If anything, cable enjoys some advantages over broadcast television with regard to emergencies. A number of cable systems provide continuous NOAA weather transmissions to subscribers, especially in areas where severe weather conditions are prevalent. Some also have regular or emergency-access channels for local governmental officials.

11. Also sharing the dependence on utility power are most broadcast-television receivers (and presumably) the SSDD. Thus, in a disaster of large scope, not only the SSDD but also most broadcast receivers and signal sources will be rendered dark. NBMC has not voiced concern

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over this widespread vulnerability, just that of the SSDD. Furthermore, the Emergency Broadcast System cannot reach those using broadcast-television receivers or SSDDs with video games or home computers or to watch prerecorded video tapes or discs. Those cable subscribers who are viewing most nonbroadcast cable channels are similarly isolated from most EBS alerts, regardless of their choice of display equipment. For example, a nationally distributed cable-movie service is unlikely to interrupt its programming to provide a localized EBS warning. In each of these plausible situations, an individual labors under the same EBS "disadvantage" whether he is using an SSDD or one of the vast majority of broadcast-television receivers. Thus, the SSDD poses no greater threat to the utility of the Emergency Broadcasting System than the overwhelmingly common variety of television set. Finally, it must be emphasized that the overwhelming majority of homes have more than one broadcast-television receiver, and those who purchase a specialized device such as the SSDD will by all odds have at least one all-channel, broadcast-television receiver at hand. Furthermore, nearly every home has at least one radio, the mainstay of the Emergency Broadcasting System. Under these circumstances, it seems most unlikely that the ability to receive EBS information when it is needed will be frustrated by the presence of an SSDD in the home.

12. NBMC's social and economic arguments are speculative, internally inconsistent, and unpersuasive. We believe that the SSDD will provide consumers with an equipment-purchasing alternative, and that such is desirable and in the public interest. In the final analysis, we believe that generally consumers know what they are buying and make informed choices. It is reasonable to presume that people will buy the SSDD with sufficient knowledge of its limitations, which are obvious on the face of the device. For these reasons, we also reject RCA's suggestion that we require SSDDs to be labelled to advise consumers. No arguments have persuaded us that such a label is necessary.

13. It is alleged that our *Opinion* was inconsistent because it said the Sanyo device was not a television receiver for All-Channel purposes but then treated it as a TV receiver for the purpose of meeting Part 15 technical standards. The answer, of course, is that, although we have determined that the All-Channel Act and our all-channel rules do not logically apply to the SSDD, the device poses the same interference threat as a broadcast-television receiver because it has a local oscillator. It should be noted also that both devices fall under the Commission's new verification program. As long as they meet our technical standards, they can be marketed without application to the Commission.

Procedural Matters

14. The petitioners allege that our *Opinion* has in effect amended our all-channel rules, and that such a result can only be achieved through a formal rule-making procedure coupled with regulatory flexibility analyses. NAB, for example, points to the head caption of our *Opinion*, "Amendment of Part 15. . . ." Our *Opinion* is said to fail to set forth enunciated standards for determining the legality of other, but not identical, products. We disagree with the former point and feel that the latter is not relevant. The disposition of waiver requests is not truly rule-making in nature. Rather, waiver proceedings are more properly termed adjudicatory. Here, we are dealing with the applicability of a statute and enabling rules to a particular device. We see no

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need at this time to develop an all-encompassing standard as to what is within or without the scope of the Act and our rules. It is sufficient to do what we have done — to analyze the statutory and regulatory status of Sanyo's product.

15. Undue emphasis is placed on the captioning of our *Opinion*, which was the result of an editorial error. Sanyo requested a waiver, not an amendment, of our rules. We did neither. Rather, we determined that the SSDD is outside the purview of the rules and their statutory underpinnings. Furthermore, NAB is misguided in its allegations of procedural defect. NAB, pointing to Subpart C of Part 1 of our rules, claims that we cannot dismiss any petition after public notice of its tendering. The rules NAB cites are inapposite. They set forth the procedures to be followed in the rule-making proceedings, not waivers. As a matter of custom, which we believe sound, we generally give public notice of waiver petitions when we feel that comment from various parties would be helpful in our deliberations on the merits of the waiver request. However, no rule of procedure, statutory provision, or line of precedent compels us to do so. Even if those procedural rules were applicable, we would not consider ourselves unable to dismiss a petition after public notice of its tendering has been given. That would deprive us of a needed degree of flexibility. Any number of circumstances warranting dismissal might arise. We would not read those procedural rules so narrowly. We may choose not to deal substantively with a petition when the proper course may be simply to dismiss it.

16. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration filed by the National Association of Broadcasters, the Association of Maximum Services Telecasters, Inc., the Council for UHF Broadcasting, and RCA Corporation ARE GRANTED.

17. IT IS FURTHER ORDERED, That on reconsideration, our holding set forth in the *Memorandum Opinion and Order, In re Petition of the Sanyo Manufacturing Corporation, supra*, IS AFFIRMED.

18. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send, by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to each of the parties to this proceeding.

William J. Tricarico,

Secretary

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

IN WHICH COMMISSIONER JAMES H. QUELLO JOINS

RE: Reconsideration of Dismissal of Waiver Petition filed by the Sanyo Manufacturing Corporation concerning manufacturing of a "Specific Signal Display Device"

Footnotes

1. The SSDD is a display device designed to produce an audiovisual output via its cathode-ray picture tube and loudspeaker when driven by an input signal comprising a VHF carrier signal modulated by an NTSC-format (standard television) composite video signal. The frequency of the carrier must be either at

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Channel 3 or 4, the two channels to which the SSDD can respond. The composite video signal can include color or sound information, or both. According to Sanyo, the SSDD is intended to be driven by such signal sources as the program-selector units provided to cable-television subscribers, and the modulated r.f. outputs of video games, personal computers, video disc and cassette players, etc.

2. NBMC claims that its untimely filing should be accepted since no other consumer group has participated in this proceeding. To have a more fully developed record before us, we will consider the NBMC filing informally.

3. See 47 C.F.R. Secs. 76.54 *et seq.*

4. See 47 C.F.R. Sec. 15.236.

1. Dissenting Statement of Commissioner James H. Quello in Which Commissioner Henry M. Rivera Joins, FCC 84-261 (July 20, 1984).

2. 47 U.S.C. Section 303(s), *as amended*; 47 C.F.R. Section 15.65.